Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS ("UPOW"),

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the treaty "right of taking fish . . . in common with all citizens" interpreted by this Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), allows Indians to enter privately-owned tidelands and take 50% of shellfish which are the owners' property?

2. Whether the circuit court may decline to apply this Court's "central principle" that the treaties secure "no more than is necessary to provide the Indians with a livelihood – that is to say, a moderate living" and allow one-half the shellfish from private lands to be taken by Indian tribes even though each tribe has exceeded that level as a consequence of casino gambling, and other income? *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, supra,* at 686.

3. Whether treaty harvest should be taken from publicly-owned tidelands, which make up nearly half of the case area tidelands, and not from private lands?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below were:

Petitioners: 26 Tideland and Upland Private Property Owners, representing the United Property Owners of Washington (UPOW), intervened as defendant/appellant below. Named representative property owners were Dan Buehler, Robert L. Davis, Bruce I. Fielding, Arthur J. Gerdes, Joe Hoots, Keith C. Huetson, Commander John C. James, Richard Sayre Koch, Elaine C. Lefler, Joan Lemonds-Roush, John S. Lewis, Steven L. Luke, Edwards R. McMillan, Robert F. Newman, Mark A. Hysether, Arthur I. Price, Ray D. Randall, Cynthia Rasmussen, Robert G. Shanks, Axel Strakeljahn, Leana Tracy, Stuart W. Turner, George B. Usnick, Lee S. Vincent, Joan Walker, and William E. Whitney, Jr.

The State of Washington was the original defendant/appellant.

Three other groups of private property owners were also intervenor-defendants/appellants below, one industry group and two groups of title insurance policy holders. These three separate groups are:

a. The Puget Sound Shellfish Growers Association ("Growers") consisting of: Taylor United, Inc.; Olympia Oyster Company; J & G Clams, Inc.; G. R. Clam & Oyster Farm; Cedric E. Lindsay; Minterbrook Oyster Company; Charles and Willa Murray; Skookum Bay Oyster.

b. "Alexander group" consisting of Larry B. and Shirlee Alexander, Harold E. and Billie B. Bauer, James and Ann Carter, William J.

PARTIES TO THE PROCEEDING BELOW – Continued

and Jeanette Chase, Mrs. Frances A. Fellows, George L. Grader, Earl D. and Millicent Ann Hunsperger, Edward B. and Eleanor J. Krenz, H. J. Merrick, Gordon W. Moss, Sewall L. and Emma M. Reynolds, John D. Riach, Alva Hazel B. Robb, Irene D. Smith and Providence Worley.

c. "Adkins group" consisting of William and Charmond Adkins, Grace Boyd, Pierce W. and May H. Davis, Rosemary Duncan, James E. Hadley, James C. and Sarah H. Johnston, William and Jo Ann Kirsh, David A. Mitchell, Louis Nawrot, Robert and Sandra Stevenson and Boon Ho Woo.

Respondents: The plaintiffs, appellees/cross-appellants below, are the United States and the following Indian tribes: Muckleshoot, Nooksack, Upper Skagit, Squaxin Island, Lummi, Makah, Tulalip, Swinomish, Quileute, Puyallup, Hoh, Suquamish, Quinault, Nisqually, Jamestown S'Klallam, Lower Elwha S'Klallam, Port Gamble S'Klallam, Skokomish, Sauk-Suiattle, and Stillaguamish.

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PETITION FOR A WRIT OF CERTIORARI

The 26 Tideland and Upland Private Property Owners (UPOW) petition this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit described below.

OPINIONS AND ORDER BELOW

The Ninth Circuit opinion amending its original opinion and denying rehearing en banc is reported at 157 F.3d 630, appendix[1] ("App.") 1-50. That opinion affirmed in part and reversed in part the district court for the Western District of Washington decisions at 873 F. Supp. 1422 (App. 51-94), 898 F. Supp. 1453 (App. 95-134), and 909 F. Supp. 787 (App. 135-148).

JURISDICTION

The Ninth Circuit Court of Appeals filed its opinion on January 28, 1998, *United States v. Washington*, 135 F.3d 618 (9th Cir. 1998). On September 25, 1998, the Court of Appeals amended its opinion, denying the petitions for rehearing and rejecting the suggestion for rehearing en banc. App. 1-50. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Treaty with Nisqualli (Treaty of Medicine Creek), 10 Stat. 1132 (1855); Treaty of Point Elliott, 12 Stat. 927 (1859); Treaty of Point No Point, 12 Stat. 933 (1859); Treaty with the Makah (Treaty of Neah Bay), 12 Stat. 939 (1859) and the Treaty with the Quinault (Treaty of Olympia), 12 Stat. 971 (1859).

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[1] There are four separate Petitions being concurrently filed, relying on the single Appendix to Petitions filed by the State of Washington.

STATEMENT OF THE CASE

Introduction

This case involves a Ninth Circuit interpretation of the "right to take fish" under Northwest Indian treaties to authorize the Tribes to enter private properties and take one-half the clams and oysters of the owners. The Panel[2] purports to be faithfully following this Court's prior interpretations in this same case.

The UPOW private owners submit that the Ninth Circuit Court's construction violates private property rights under the United States and Washington constitutions and conflicts with the express provisions and intent of the treaties themselves, as interpreted by this Court.

The treaty articles contain two sets of promises, to the Indians and to settlers, whom this Court described as "beneficiaries" of the treaties.

The promise to the Indians was of reservations, payments, and of fishing rights "in common with all citizens" and has been fulfilled including enforcement by this Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n (Fishing Vessel)*, 443 U.S. 658 (1979). These tribes take far more than 50% of salmon runs subject to the fishing right today. A proviso to this same article immediately required Indians to cease taking clams from "any beds staked or cultivated by citizens."

The United States and the signatory Indians also made treaty promises to the settlers and citizens; that they could own their own lands and enjoy peaceful enjoyment. For 140 years these promises were kept – until the rulings of the court below.

Several articles of the treaties expressly incorporate this promise. Article 1 of each was an absolute cession of *all* interests in the lands. Article 4 (or 5) was agreement

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[2] Judge Stephen S. Trott and visiting Judge Donald P. Lay of the Eighth Circuit; Judge Robert R. Beezer concurred.

that Indians have settler "permission" to go on settler "claimed or occupied" land (since they would have their own reservation homes). Article 8 (or 9) was an express Indian agreement "to be friendly with all citizens . . . and pledge . . . to commit no depredations on the property of such citizens." These promises laid the foundation for private ownership of land, eventually including tidelands, with constitutional rights and protections. These protections were ultimately extended to the Indians, including many who later claimed and owned lands – and tidelands – in Washington.

Concurring Ninth Circuit Judge Beezer expressed the conflict that Court has created:

> Property rights, which have been undisturbed for generations, are encumbered by our decision today. [citing and quoting *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310, 1 L.Ed. 391 (1795)] . . . Property rights, so fundamental to American government, need not be trampled upon.

United States v. Washington, 157 F.3d at 659, App. 46.

The Ninth Circuit Panel claims to be faithfully implementing prior decisions of this Court in its holding that the Tribes are entitled to enter private tideland properties and take half the clams and oysters. The same concurring judge also stated, incorrectly we believe, that this "trampling" on fundamental property rights was required by this Court's prior decisions:

> It is, however, the law of this case and of the Supreme Court that the reserved fishing right makes no distinctions between migratory fish and shellfish or between fish runs and static fishing grounds. The origin of this rule of law is perplexing.

Id. at 657.

We establish below that the Ninth Circuit decision actually *conflicts* with the relevant decisions of this Court

– and *conflicts* with decisions of the other two circuits which have considered similar treaty rights, each holding that private property rights are not abrogated by the treaties.

The Circuit decision further *conflicts* with the decisions of the Washington State Supreme Court, which have determined that shellfish on private lands are the private property of the owner, and thus entitled to protection under the laws and constitution, even from Indian harvests.

The Ninth Circuit's rewrite of the treaty that has "trampled" on private property rights comes 140 years after all parties, including responsible government officials who opined on the subject, believed the contrary.

This Court should grant the Writ and resolve this apparent conflict between treaty articles (as construed) and the paramount constitutional protection for private property rights.

A. Nature of the Case and Course of Proceedings.

1. Early History of the Case.

In 1970, the United States and Western Washington Indian tribes filed a Complaint against the State of Washington. They sought a declaratory judgment interpreting the treaty right to fish for salmon and steelhead. The district court retained continuing jurisdiction of the litigation. *United States v. Washington*, 384 F. Supp. 312, 327-28 (W. D. Wash. 1974), *aff'd*. 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

This Court later granted certiorari to "interpret this important treaty provision and thereby to resolve . . . what, if any, right the Indians have to a share of the fish, ... " *Fishing Vessel*, 443 U.S. at 674.

This Court rendered its decision in 443 U.S. 658 and ordered:

> The judgments of the Court of Appeals for the Ninth Circuit, the District Court for the Western District of Washington, and the Supreme Court of the State of Washington are vacated and the respective causes are remanded to those courts for further proceedings not inconsistent with this opinion, . . .

Fishing Vessel, 443 U.S. at 696.

Note that no private landowners were party to any of these earlier proceedings, as the claim involved the treaty "right of taking fish,", e.g., salmon and steelhead. No claim of any kind was presented against landowners. Also, most of these Tribes had previously filed claims for the taking of the *lands* under the Indian Claims Commission Act, 60 Stat. 1049 (1949), and been paid.

2. The "Shellfish" Subproceeding

On May 19, 1989, sixteen Puget Sound Indian Tribes began this new subproceeding in *United States v. Washington* continuing jurisdiction with the filing of a Request for Determination re: Shellfish (subproceeding 89-3).

The Tribes then claimed the fishing right included a treaty right to harvest shellfish from all tidelands in Western Washington, including private and state owned tidelands, together with a right of access over upland properties. (Only later after the United States supported the Tribes' claim was it clarified that the Plaintiffs did not include the substantial federal tideland ownership in this claim.)

With respect to the lands of private owners, the Tribes' belatedly complained of:

> [T]he sale and lease of tidelands by the state to private parties who refused to permit access to Indians (which refusal was enforced by state and local law enforcement). . . .

Amended Request, pp. 5-6, ¶ H.

The subproceeding was filed against the State of Washington (not against private landowners). The United States did not sign or file the Request but later supported it below.

3. Participation of the United Property Owners of Washington (26 Tideland and Upland Private Property Owners).

Private Owners of waterfront uplands and private owners of tidelands in each different treaty area banded together to form United Property Owners of Washington (UPOW) to defend their property rights. Most are waterfront home owners or members of residential communities who share a beach. A few have commercial shellfish farm licenses.[3]

These Tideland and Upland Private Property Owners moved to intervene and for class certification with 26 as representatives selected by ownership in each treaty area. They include upland (only) owners who abut public beaches as well as owners of both the uplands and tidelands. CR 12270, CR 12272. Both motions were denied. On appeal, the Order Denying Intervention was reversed. *United States v. Washington*, 9th Circuit No. 93-35324, November 2, 1993 (unpublished opinion).

Two other groups of private owners with common title insurance companies and a "Shellfish Growers" organization also were party.

After a first trial, the court declared the scope of the Tribes' rights to take shellfish. *United States v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994), App. 51-94.

After a second trial, the court entered an "Order Re: Implementation." *United States v. Washington*, 898 F. Supp.

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[3] These UPOW members are small operations and not part of the "Shellfish Growers" association.

1453 (W.D. Wash. 1995), App. 95-134. An amended Judgment was entered December 19, 1995. *United States v. Washington*, 909 F. Supp. 787 (W.D. Wash. 1995), App. 135-144. All parties appealed to the Ninth Circuit.

B. Disposition of the Circuit Court Below.

The Ninth Circuit Panel broadly held that the Tribes have treaty fishing rights to take 50% of clams and oysters on all Washington tidelands,[4] including those in private ownership.

Unlike fish, the Panel held the Tribes are not required to prove treaty "usual and accustomed" areas where they historically take shellfish. The entire Puget Sound and all (state) public and private tidelands, are held subject to these treaty claims.

On private beaches, the Tribes are authorized to enter to conduct surveys of the clams, then enter these private lands and take 50% of the clams and oysters, subject to "time, place, and manner" restrictions. A limited exception is made for artificially cultivated beaches. App. 38.

Even though all but one tribe has a casino gambling facility providing employment and wealth, the district court "declines to apply the Moderate Living Doctrine . . . . " (App. 85) (referring to this Court's ruling that the treaty secures "no more than is necessary to provide Indians a livelihood – that is to say, a moderate living" *Fishing Vessel*, 443 U.S. at 686.) The Ninth Circuit also affirmed this ruling, 157 F.3d at 652 (App. 33).

As relates to private upland owners, the decision also allows the Tribes to establish rights to beach access over private uplands upon a showing other access is not available (rather than requiring a showing of historical usage for such easements). App. 37-38.

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[4] However, of over 160 miles of *federal* beach miles, many remain off-limits to tribal harvest, especially military bases.

C. Statement of Facts Relevant to Issues Presented for Review.

In the interests of brevity and avoiding repetition, the following includes only historical facts particularly relevant to the private landowners. Additional facts are in the concurrently filed Petition of the State, Growers, and Adkins group.

1. Historical and Legal Background.

After President Fillmore signed the act creating the Washington Territory in 1853, Congress extended the terms of the Donation Land Act (9 Stat. 937) to this new territory. That Act allowed settlers to claim 160 acres to which they would receive title after four years continuous residency. In 1854 the Preemption Land Act was also extended to Washington Territory. That Act allowed settlers to occupy and claim land before government surveys with first right to buy. By the time of the first treaty in 1854, over 329,000 acres in Washington had been surveyed and by 1859 over a million and a half acres.

Isaac Stevens was appointed Governor and Territorial Superintendent of Indian Affairs. Because of the rapid influx of settlers, Governor Stevens proposed treaties to extinguish the Indian claims:

> "[P]rompt measures [should] be taken to arrange with these Indians terms as to the purchase of their lands, in order that the settlements which are sure to be made in the coming years in great numbers may meet with no hinderance for this cause."

Stevens' letter to Manypenny, December 6, 1853.

In May, 1854, George W. Manypenny, Commissioner of the Indian Office, met with Governor Stevens in Washington, D.C. to discuss the new Government policy to

extinguish all Indian land claims and place them on temporary reservations which would be allotted to Indians in conjunction with measures to educate and "civilize."

Stevens was instructed to rely upon model Indian treaties executed under Manypenny's direction. (Manypenny ultimately supervised the negotiations of 43 treaties.)[5] The treaties were executed commencing in December 1854 (Medicine Creek), followed by the four others in Western Washington in 1855.

The treaties, as written by the United States, were read and explained. The Indians then received presents and signed. Few changes were made as evidence the uniformity of the treaties here and general consistency with Manypenny treaties in other parts of the Country. (The treaty minutes are all exhibits below, Ex. No. D-64.)

2. Treaty Provisions.

Prior court attention has focused on the "fishing" article of the treaties. In this case, other articles of the treaties defining settlers' rights and land ownership are equally important.[6]

> The first Article of each of the treaties provides:
>
> The said tribes and bands of Indians hereby *cede, relinquish, and convey* to the United States *all their right, title, and interest in and to the lands and country* occupied by them, bounded and described as follows . . .

E.g., Treaty with Nisqualli, 10 Stat. 1132 (1854), emphasis added.

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[5] Of the two treaties considered by this Court in *Minnesota v. Mille Lacs*, No. 97-1337, argued December 2, 1998, one, the 1855 Treaty with the Chippewa, was a Manypenny treaty. The other, the 1837 Treaty with the Chippewa, was *not*.

[6] The whole of each treaty is reprinted in the Appendix, App. 169-210.

In "consideration" of this land cession, a price was set, and the United States made annual payments over 20 years, in varying amount.[7] (*See, e.g.*, Article 4.) Each treaty also contained an article setting aside reservations (these reservations abutted shellfish beaches). *See, e.g.*, Treaty with Nisqualli, 10 Stat. 1132 (1854), Art. 2, App. 170.

Immediately effective (even before ratification), one article required the Indians to obtain settler consent to remain on *any* occupied lands:

> In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, *if with the permission of the owner or claimant.*

See, e.g., Treaty with the Nisqualli, 10 Stat. 1132 (1854), Art. 2, App. 170, emphasis added.

The Indians, by signing the treaty, thus agreed that a settler's claim or occupation (predicate to later title under either the Preemption Land Act or Donation Act) was exclusive. Even the Tribes' expert admitted that such settlers' claims often included tidelands. The tidelands were the connecting link to water transportation and communication, and clams were an important food for settlers.

The article dealing with fishing, gathering and hunting varied in number but were substantially the same:

> The right of taking fish, at all usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and

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[7] As previously noted, the Tribes later brought ICC claims for under-payment and received payments of full value.

> unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens. . . .

Treaty with Nisqualli, 10 Stat. 1132 (1854), Art. 3.

Each treaty also had an article in which the Indians expressly pledged to respect the settlers' property, Article 8 (or 9), in the following terms:

> The aforesaid tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and *pledge themselves to commit no depredations on the property of such citizens.*

See, e.g., Art. 8, Treaty with Nisqualli, emphasis added.

In *Fishing Vessel*, 443 U.S. at 661, this Court began its decision with the treaty purpose "[t]o extinguish the last group of conflicting claims to lands . . . The Indians relinquished their interest in most of the Territory in exchange for monetary payments (and reservations). . . ." The dissent expanded:

> The primary purpose of the six treaties negotiated by Governor Stevens was to resolve growing disputes between the settlers claiming title to land in the Washington Territory under the Land Donation Act of 1850, 9 Stat 437, and the Indians . . . ceded their claims to vast tracts of land, retaining only certain specified areas as reservations . . . By thus separating the Indians from the settlers it was hoped that friction could be minimized.

Fishing Vessel, 443 U.S. at 699.

The treaty was also intended to provide the Indians with a continuing livelihood especially during a transition period. This Court majority, speaking of salmon, held:

> [T]he central principle here must be that Indian treaty rights to a natural resource that once was

> thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood – that is to say, a moderate living.

Fishing Vessel, 443 U.S. at 686-7.

Several articles within the treaty were to assure their livelihood, including reservation clearing and farming instruction. Of the native food sources available to the Indians, salmon was the most important:

> All of them shared a vital and unifying dependence on anadromous fish . . . They were heavily dependent upon anadromous fish for their subsistence and for trade with other tribes and later with the settlers. Anadromous fish was the great staple of their diet and livelihood.

Fishing Vessel, 443 U.S. at 664 including n.6.

The record also shows that the Indian language and "Chinook jargon," through which the treaties were translated, had very different words for fish (and each species of swimming fish) and those words for clams, oysters, etc. (Two contemporaneous Chinook dictionaries were G-29 a and c). The words were not even related; "shellfish," as a sub-set of fish in the English language, had no Indian or Chinook equivalent. Where fish are discussed, it indicated salmon and steelhead, and shellfish species are not expressly mentioned in any of the minutes of these treaties.[8]

3. The UPOW Upland and Private Property Owners; Present Day Successors in Interest to Settlers.

The case area of Puget Sound is different from the coast along much of the Pacific Ocean. These 2,000+ miles

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[8] Minutes of the unsuccessful treaty negotiations at Grays Harbor do include several references to oysters. Richards Rep. 81-82.

of shoreline are relatively protected waters and include hundreds of islands, narrow passages, and quiet coves. Away from Washington's cities, secluded and peaceful beaches now host retirees and families looking to escape from the increasingly urban Northwest. The use and enjoyment of tidelands by such private property owners is vital to their unique quality of life.

"UPOW" consists of such owners described by the court as "innocent purchasers" because they had no notice of any treaty claim for the last 140 years. Of the over 150,000 private ownerships of tidelands or uplands in the case area, approximately 64,000 are associated with UPOW. Tr., May 12, 1995, at 838. App. 14.

These private property owners have enjoyed for over a century the quiet enjoyment of that property, including the right to invite or exclude others. The Tribes, of course, had reciprocal rights on their originally "exclusive" reservations (until much was allotted and sold.)

A real estate appraiser with expertise in waterfront properties concluded that the Tribes' claim, as construed by the court below, with loss of control and 50% harvest diminishes private real property values by up to 40 percent. Tr. Vol. 11 (May 2, 1994), p. 2158 through p. 2166.

For some UPOW owners, their tidelands are an important source of income and some have commercial clam farm licenses. The Panel's 50% shellfish rights make profitable shellfish harvest unfeasible for such small operators. Tr. May 12, 1995 at 848.

Each of the UPOW private owners has staking or other outward indications to identify private ownership. These range from survey stakes and rocks marking water boundaries to signs and bulcades indicating private ownership. Typically, their homes are easily visible on the uplands immediately abutting tidelands. No witness claimed there was any confusion over the present-day

ownership. These private owners pay taxes on these tidelands and have done so for decades.

Present tideland ownership in Washington is nearly 50:50 private/public. A United States exhibit (U.S. 181) identified 53% of the tidelands as privately owned and 47% cumulatively as Indian reservation and other federal (approximately 167 miles) and state (880 miles). UPOW argued below that any treaty shellfish entitlement should come from public lands, especially reservation and federal.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Ninth Circuit That Private Property May Be Entered and Taken Conflicts with the Decisions of this Court and the Seventh and Eighth Circuits.

In *Antoine v. Washington*, 420 U.S. 194 (1975), this Court interpreted an agreement with the Colville Tribe, providing a similarly phrased "right to hunt and fish in common with all other persons." This Court noted that:

> A claim of entitlement to hunt on fenced or posted private land without prior permission of the owner would raise serious questions not presented in this case.

420 U.S. at 207-08 n.11.

This case presents just those questions.[9] Most treaty cases have not, because private property rights were the very reason for the treaties. Indeed, as in *Antoine*, it has often been *conceded* that treaty rights do not abrogate private property rights. For example, in *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 755 (1985), this Court noted that the Klamath tribe "agrees

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[9] And related questions raised by the taking of 50% of clams since they are also private property in Washington.

that ceded lands now privately owned may be closed to tribal hunting and fishing."

The Ninth Circuit Court decision subordinating private property rights also conflicts in principle with this Court's holdings that the right to exclude others from private property is an essential attribute of property ownership under the U.S. constitution:

> We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property. . . .

Nollan v. California Coastal Community, 483 U.S. 825 (1987) (citations omitted).

In light of this constitutional property right to exclude (and the treaty intent to protect it), the Seventh and Eighth Circuit courts have specifically held that tribal treaty hunting and fishing rights may not be extended to private property. The Ninth Circuit decision conflicts with these circuit decisions.

In one case recently argued before this Court, the Eighth Circuit upheld a district court decision that a treaty right generally did *not* authorize entry on private property. The district court held:

> [E]xercise of the 1837 usufructuary rights should be limited to lands in the ceded territory that are not privately owned because no right of access was included in the privilege.

Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 837 (D. Minn. 1994).

The Eighth Circuit in *Mille Lacs Band v. Minnesota*, 952 F.2d 1362 (D. Minn.), *aff'd* 124 F.2d 904, 933-34 (8th Cir. 1997), affirmed and held that Chippewa "treaty rights . . . may only be exercised on lands, public or private, open to the general public for hunting, fishing and gathering by operation of state law." Certiorari was granted

on other questions June 8, 1998, and the case argued December 2, 1998 (*Minnesota v. Mille Lacs Band of Chippewa Indians*, No. 97-1337).

Similarly in conflict with the Ninth, the Seventh Circuit held that a Chippewa treaty right of "hunting, fishing, and gathering the wild rice" does not extend to privately owned lands. *Lac Courtes Oreilles Band v. Wisconsin*, 700 F.2d 341, 365 (7th Cir. 1983), construing the Treaty with Chippewas, July 29, 1937 (7 Stat. 536). The Seventh Circuit was even more clear than the Eighth on that issue: "the exercise of these rights is limited to those portions of the ceded lands that are not privately owned." 700 F.3d at 365.

In a later ruling, the Seventh Circuit not only held that the reserved rights did not extend to private lands but rejected the Tribes' contention that they could exercise those rights on public lands which became private. That tribal argument was held inconsistent with the *purpose* of the treaty, which, like the treaties here, was to encourage settlement and private ownership:

> The ceded territories were ceded for the purpose of eventual settlement. Some may never be settled but others may be, and that settlement by going into private hands simply should not be subject to the reserved usufructuary rights.

Lac Courtes Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 760 F.2d 177, 182 (7th Cir. 1985).

In *United States v. Winans*, 198 U.S. 371 (1905), this Court did hold that the Indians had a right to get to a fishing station on the bank of the Columbia river by means of a long recognized and established trail on private land,[10] because the Treaty "fixes in the land such easements as enable the [fishing] right to be exercised."

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[10] The case concerned language from another Stevens treaty. Treaty with the Yakimas, 12 Stat. 951 (1855).

Id. at 381. This Court did *not* hold that the tribes had a right across all private lands (which would have included the whole Columbia River bank). At issue in *Winans* was only one identified trail to a particular fishing station. This *Winans* "easement" was later described by this Court:

> existing *only* where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year that any person, not negligently or wilfully blind to the conditions of the property he was purchasing, must have known of them.

Seufert Bros. v. United States, 249 U.S. 194, 199 (1918), emphasis added. The Ninth Circuit decision here that an upland access may be created without such proof conflicts with this analysis.

The Ninth Circuit's refusal to require proof of treaty "usual and accustomed" historical usage (App. 38) also conflicts with another decision of this Court. This Court in *United States ex rel. Charley v. McGowan*, 290 U.S. 592 (1933), summarily affirmed a prior decision of the Ninth Circuit that treaty rights do not exist where usage was "occasional" rather than "usual" (summarily affirming *United States v. McGowan*, 62 F.2d 955 (9th Cir. 1933)).

In this Court, the *Winans* decision relied on below did hold that Indians could not be totally deprived of salmon by fish wheels which took the salmon before they reached the Tribes' fishery (and could even destroy the run). The Court required removal of enough fish wheels to allow part of the Columbia salmon run to return to historic Indian fishing grounds. *Winans*, 198 U.S. at 384.

Thus, the Stevens treaties secured the "right to take a share of each run of fish that passes through tribal fishing areas." *Fishing Vessel*, 443 U.S. at 679. The migratory nature of salmon meant that, without such protection, such fish could all be taken before the Indians got the

opportunity to share. This is simply not true of clams. For example, those clams on reservation beaches will surely not be taken before tribal harvest.

The circuit court concurring opinion also recognized this distinction:

> The underpinning of the [Supreme] Court's interpretation of the Stevens Treaties should not apply to shellfish because they are, with the exception of crustaceans, immobile. There can be no device that prevents the migration of immobile shellfish to, through or from the tribes' usual and accustomed fishing grounds.

United States v. Washington, 135 F.3d at 842.

There is a separate point of conflict in the Ninth Circuit holding that the salmon rulings required it to allocate 50% of all clams, including those on private property.

Shellfish found in privately owned land have historically been held by this Court to be the possessions of the owner of that land:

> [T]here is a plain distinction between [embedded shellfish] and game birds or freely moving fish . . . Such birds and fishes are not even in the possession of man. On the other hand, it seems not unreasonable to say that mussels, having a practically fixed habitat and little ability to move, are as truly in the possession of the owner. . . .

McKee v. Gratz, 260 U.S. 127, 135-6 (1922) (Holmes, J., re mussels in Missouri stream bed) [citations omitted]. *See, also, Den v. The Jersey Co.*, 56 U.S. 426, 432-33 (1853).

The Washington Supreme Court cases to the same effect are considered in the next section. They conclude as has this court that ownership of the land includes ownership of the clams. The Indians *ceded* all such interests in these lands in Article 1 of each treaty.

These holdings provide another separate ground for concluding all tribal claims were extinguished under decisions of this Court because most of these Tribes were paid in full under the Indian Claims Commission for all previously uncompensated interests in lands (and other claims are barred).[11]

This Court has held these ICC payments included "a full discharge . . . of all claims and demands touching upon any of the matters involved in the controversy. . . ." *United States v. Dann*, 470 U.S. 39 (1985). *See, also, Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). In conflict with this holding the Ninth Circuit held "UPOW's argument that the Tribes' treaty rights were extinguished by the Indian Claims Commission Act . . . is without merit" App. 29.

II. The Circuit Decision Conflicts with Decisions of the Washington State Supreme Court.

Shortly after statehood, Washington commenced selling tidelands to private owners as authorized by its constitution. The amount of tidelands in "common" ownership and usage began to diminish. This process was accelerated by the separate *lease* of state tidelands.

The question here was raised, and decided by the Washington State Supreme Court; whether Indians had common rights which somehow overruled the private owner or leaseholder's rights to exclude.

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[11] E.g., the Medicine Creek Treaty tribes' judgment is *Squaxin Tribe of Indians*, 34 Ind. Cl. Comm. 311 (1974); the Point Elliott Treaty tribes' judgment is *Upper Skagit Tribe of Indians*, 13 Ind. Cl. Comm. 583 (1964); and the Point No Point Treaty tribes' judgments are *Skokomish Tribe of Indians*, 12 Ind. Cl. Comm. 211(a) (1963) and *S'Klallam Tribe of Indians*, 23 Ind. Cl. Comm. 510 (1970).

In *Sequim Bay Canning Co. v. Bugge*, 94 Pac. 922 (Wash. 1908), the Supreme Court of the State answered the question dealing with the same Indians who requested the 1905 Indian Affairs Opinion referenced below, p. 23 (which also held the Indians' rights did not extend to the private leased lands).

The Washington Supreme Court held that, unlike swimming fish, shellfish:

> live, not merely upon, but actually within, the land. They therefore, in a very material sense, belong with the land. . . . It must follow therefore that, if the state has authority to invest one with the private ownership of the tide lands, such investiture must carry with it the right to exercise dominion and ownership over what is upon the land, and especially over things so closely related to the soil as clams.

Id. at 131.

The Washington Supreme Court then went on to uphold a complaint for injunction in favor of private leaseholders, against Indians who had no right to enter or to take the private property of the leaseholder.

Later Washington cases to the present have relied on this venerable precedent. E.g., in *Washington v. Van Vlack*, 172 Pac. 563 (Wash. 1918), that court again held:

> [C]lam beds may become the subject of private ownership which passes to the grantee by a conveyance from the state of tide lands in which the beds are located.

Id. at 564. Twenty years later the Washington State Supreme Court repeated:

> [C]lams, because of their fixed habitation in the soil, became the subject of private ownership when title to the clam beds passed from the state, ...

Wiegardt v. Brennan, 73 P.2d 1330, 1332 (Wash. 1937).

Each decision cites the holding in *Sequim Bay* which remains good law in the Supreme Court of Washington, at least until the Ninth Circuit decision here. A private holder of the tidelands has a property right in the shellfish which will be protected by the Courts and the "in common" right asserted below did not abrogate or extinguish such property right.

The Circuit decision conflicts on both principles.

III. The Ninth Circuit Holding Conflicts with Historical Understanding and With the Interpretation of Responsible Officials

This Court has reiterated the need to "take note of the contemporary historical context and subsequent congressional and administrative references. . . . " *South Dakota v. Yankton Sioux*, 118 S. Ct. 789 (1998).

Important evidence, of course, is the language of the treaty articles included per the Commissioner's instructions (and model treaty), and the understanding of the Territorial Governor, all cited above. These are probative of the official understanding at the time and reflect the understanding that *all* Indian claims to the land were extinguished in order that settlers would acquire full and exclusive property rights.

As the "contemporaneous view of the Executive Officer responsible for administering the statute," this understanding is "entitled to very great respect." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 254 (1985). *Accord Watt v. Alaska*, 451 U.S. 259, 272-273 (1981).

The historical understanding there were no treaty rights to private lands may also be proven by considering the later conclusion of public officials, including the Commissioner of Indian Affairs. These were consistent in reflecting the understanding that the treaty right did not abrogate ownership of private tidelands (even including those leased).

The most important is from the Commissioner of Indian Affairs, since this was the administrative agency with direct authority over the subject area. The Commissioner in a letter opinion rejected the Indian claim to go on state tidelands which had been leased:

> [A]s the tide lands to which you refer are not embraced within the boundaries of an Indian reservation, it is the opinion of this office that such lands are under the control and jurisdiction of the State; that the Indians should not be permitted to trespass upon the tideland leased from the State; that in case they desire special privileges as to the digging of clams from the tidelands referred to, it will be necessary for them to lease the same from the State of Washington.

Indian Commissioner to Liston (Indian Agency), March 20, 1905, at 1-2 (App. 211-213). The Washington Supreme Court reached the same conclusion in *Sequim Bay, supra* (dealing with the same Indians' claims).

The Indian agent in Washington was later asked a similar question, and confirmed that owners of land at the mouth of the Dungeness River were "within their rights" to exclude Indians from private tidelands. Taylor to Superintendent Commissioner Wilson (June 16, 1916), Ex. PL-367.

Coming from the federal agency charged with overseeing these Indian affairs, these interpretations are entitled to "considerable deference." *Andrus v. Idaho*, 445 U.S. 715, 729 (1980). *Accord National R.R. Passenger Corp. v. Boston & Main Corp.*, 503 U.S. 407, 417 (1992). Ironically, it continues to be the United States position that treaty Indians may be excluded from federal beaches.

The pattern of treaty understanding continued into the Twentieth Century. Many Indians leased and purchased tidelands from the State, Ex. D-473; Ex. PL-341 at 105 ("a number of the original applicants for oyster lands titles were Indians"). The district court found that "some

individual members of the plaintiff tribes purchased tidelands. . . . " App. 77.[12]

On May 27, 1936, the Director of Fisheries advised Indians with respect to digging claims that "[o]ff your reservation, you are subject to the same laws that govern the white people." Ex. PL-400.

A Department of Fisheries Memorandum dated May 22, 1950, notes the Tulalip Indians' request for permits to dig clams off-reservation: "they would appreciate this favor if granted." Ex. PL-425.

In answer to a U.S. Senator's inquiry, the State similarly responded that a Suquamish Indian could request permission to dig clams on government tidelands. (Mabe to Sen. Magnuson (November 3, 1959), Ex. D-141.

The private landowners' present interpretation is confirmed by this "practical construction adopted by the parties." *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943), and conflicts with that of the Circuit Court.

The Circuit not only declined to accord the Indian Commissioner and other officials' interpretation any deference, it completely ignored them. This is probably because the United States has now taken a different position, to support the Tribes. Still, the United States' position was to the contrary for 140 years and was relied upon.

The conflict between the Circuit and these interpretations provides an alternative reason to grant the writ. *See Morton v. Ruiz*, 415 U.S. 199, 201-202 (1974) ("We granted certiorari because of the significance of the issue and because of the vigorous assertion that the judgment of the Court of Appeals was inconsistent with long-established policy of the Secretary [of DOI]"); *see, also, Williams v. Lee*, 358 U.S. 217, 218 (1959) (certiorari granted because lower court decision "was a doubtful determination of the important question of state power over Indian affairs").

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[12] These Indian private owners are presumably subject to the impacts of the decision below. *See* concurring Opinion, App. 45.

IV. The Ninth Circuit Applied the Wrong Standard of Review In Conflict with Decisions of this Court and the Eighth and Tenth Circuits

The standard of review relied on by the Ninth Circuit both when upholding the district court interpretation of treaty intent *and* that court's "declining" to apply this Court's "moderate living standard" was the same – and the wrong – standard:

> [W]e have previously reviewed a district court's findings of parties' intent in entering Indian Treaties "[u]nder the highly deferential clear error standard." *See, e.g., Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.2d 334, 343 (9th Cir. 1997), *cert. denied*, 117 S. Ct. 1432 (1997). We therefore review for clear error all of the district court's findings of historical fact, . . .

United States v. Washington, 157 F.3d at 642, App. 16.[13]

After stating the district court's findings re: moderate living, the Ninth Circuit similarly held:

> This finding *is not clearly erroneous*. (n. 11)
>
> n. 11 . . . we [are] not left with "definite and firm conviction" that the district court's findings were *erroneous*.

Id. at 652, emphasis added, App. 33.

More important, the standard of review conflicts with the correct standard applied in other circuits. In 1990, the Tenth Circuit described at length the correct *de novo* standard and explained the reasons:

> The Supreme Court has issued a number of pronouncements to guide lower court interpretations of statutes and EOs [Executive

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[13] The case cited by the Ninth Circuit Panel here, *Chehalis*, was not even a treaty case but dealt with an Executive order reservation.

> Orders] affecting the status of Indian reservations. . . . In the above cases the Supreme Court has applied without comment a *de novo* standard of review in determining congressional intent- . . . . The ascertainment of congressional intent is a matter of statutory construction, which typically involves a *de novo* review. To the extent that statutory construction turns on a historical record, however, it involves a mixed question of law and fact. Where a mixed question "primarily involves the consideration of legal principles, then a *de novo* review by the appellate court is appropriate." *Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986). Such is the case here, where key district court legal conclusions, e.g., the need for explicit language mentioning boundary reduction or evidence of cession and compensation, "rest on an erroneous view of the law." *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S. Ct. 1781, 1789, 72 L. Ed. 2d 66 (1982).

Pittsburg & Midway Coal Min. Co. v. Yazzie, 909 F.2d 1387, 1383-1394 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990). (Footnote omitted.)

The Eighth Circuit has also held that the appropriate standard of review is *de novo*:

> Mixed questions of law and fact that require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles are reviewable *de novo*. . . . [citations omitted] Because our decision is predominantly one of determining whether the established facts fall within the relevant legal definition, albeit a constitutional definition, we apply a *de novo* standard of review. *Id.* at 1201-03.

Falls v. Nesbitt, 966 F.2d 375, 377 (8th Cir. 1992).

The importance of the standard applied cannot be overstated. *Oregon Dep't Fish & Wildlife v. Klamath*, 473

U.S. 753 (1985), would have been *differently* decided since the district court made the same kind of findings as here. This Court's recent review in *Yankton Sioux, supra,* reflects the same *de novo* review standard.

V. The Ninth Circuit's Opinion Presents Issues of "Grave Constitutional Dimension" and "Exceptional Public Importance."

The Ninth Circuit decision holds that a treaty fishing provision extinguishes the private property rights to exclude others – and allows the taking of 50% of the resources. To implement this, the court has approved a complicated scheme for management under the continuing jurisdiction of the federal district court.

The court's decision carves out an area of over 2,000 miles of tidelands and over two million acres in which not only private property rights are largely suspended but state conservation law is displaced by injunction. On private beaches, the *Tribes* manage their commercial harvest to take 50% – first "surveying" the clams, then regulating the harvesters.

On the *public* beaches, including parks on which oysters and clams are planted for recreational use, tribal commercial clamming will take 50% of the harvest extending through closed seasons (and violating limits). Adding to this perceived inequity, state license fees and taxes pay the state's costs to plant, and conserve this resource.

The geographic magnitude alone is a compelling reason to grant the writ. In *Andrus v. Utah,* 446 U.S. 500, 506 (1980), for example, this Court explained that it granted certiorari "[b]ecause the dispute between the parties involves a significant issue regarding the disposition of vast amounts of public lands." The area involved in that case comprised some 571,000 acres, *id.* at 506, n. 6; considerably less than the over 2 *million* (2,000,000) acres of

tidelands involved in this case. *See, also, Andrus v. Idaho,* 445 U.S. 715, 722 (1980) (Certiorari granted to resolve status of "some 2.4 million acres of desert land within Idaho." This was a comparable area.)

In addition to the geographic scope of this case, its jurisdictional significance makes it especially important. State and tribal authority over the lands and waters is dramatically changed. Within this area, 20 different tribes authorize thousands of members shellfish gathering of half the natural resources, displacing state police power.[14]

Finally, the decision forces conservation back into the Nineteenth Century by approving such practices as commercial clamming on parks and small residential beaches. It is very doubtful that other citizens' 50% share will actually be harvestable after concentrated commercial harvest has finished. If error is made in "survey" determination of clam populations, these natural resources, and their shared use, enjoyment and conservation by all citizens, will suffer because of this double harvest. That is a matter of exceptional public importance.

VI. The Circuit Court Has Disregarded this Court's Earlier Decision By Extending the Treaty Right Even Though The Tribes Have Achieved A "Moderate Living."

This Court held:

> *[T]he central principle here must be* that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but *no more than,* is necessary to provide Indians with a livelihood – that is to say, a moderate living.

Fishing Vessel, 443 U.S. at 686-687, emphasis added.

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[14] The court even approved tribal regulation of health matters for tribal commercial clamming (over UPOW's objection).

The district court "decline[d] to apply the Moderate Living Doctrine" (App. 85) based on conclusory statements about Indian financial status statewide (relying on a source 20 years out of date). *United States v. Washington*, 873 F. Supp. at 1446, App. 86. The Circuit Court affirmed, applying the wrong "clearly erroneous" standard. The circuit court indicated in a footnote that even if the Tribes' casinos were considered, it would make no difference. (157 F.3d at 652, App. 33). The actual data, including casino profits, were dramatically to the contrary.

An Economic Expert Professor applied a definition of "moderate income" from federal law, 42 U.S.C. § 5302(20)(A), and provided empirical measures of the economic resources of the Tribes. Under this federal definition, the record shows that each tribe already possesses economic resources that exceed that required for a "moderate living."

For example, as of trial, the 1992 annual "net win" of one tribal casino (Tulalip) was $12 million. Testimony of Gambling Commission Tolton (December 17, 1993) p. 53. This casino net win alone, if distributed per capita to that tribe's households,[15] would have added $23,730 per household, resulting in average tribal income exceeding that of other residents (the standard under the federal statutory definition cited above).

All but one of these Tribes now have casino gambling compacts and operate gambling casinos.[16] There has been

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[15] The Indian Gambling Regulatory Act at 25 U.S.C. § 2710(b)(3) and (d)(A)(ii) authorizes per capita distribution of casino profits.

[16] Federal Register notices of compact approval are found at 58 Fed. Reg. 9212 (Lower Elwha) and 60 Fed. Reg. 15194 (Jamestown), 16764 (Suquamish, Swinomish and Tulalip), 18704 (Nooksack and Port Gamble), 19822 (Squaxin), 26810 (Upper Skagit), 43512 (Muckleshoot), 46490 (Skokomish), 52409 (Quileute), and 65064 (Lummi).

rapid growth in popularity and profitability of these Indian casinos documented below by state public records of casino revenues.

These Tribes have not, do not, and will not rely on shellfish to obtain a moderate living. Their livelihood is being fulfilled by "other sources of support." *Fishing Vessel*, 443 U.S. at 687. Since the moderate living has been exceeded, extending tribal claims to privately-owned resources on private lands is not justified.

The contrary conclusion of the court below is clearly in error. The reason for granting the writ, however, is the court's refusal to follow this Court's decision and mandate.

> It is often stated that the decision of an appellate court on an issue of law becomes the law of the case on remand. . . . In this situation the district court owes obedience to the mandate of the Supreme Court or the court of appeals and must carry it into effect according to its terms. It can be compelled to do so by mandamus, or by a second appeal.

IB James W. Moore & Jo Desha Lucas, Moore's Federal Practice ¶ 0.404[10], at II-58-II-60 (2d ed. rev. 1993).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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